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IN THE

Supreme Court,

OF THE UNITED STATES.

October Term, 1902.

IDA McCLUNG, *Plaintiff in Error,* vs. WILLIAM A. PENNY, *Defendant in Error.*	*No. 384.* *In Error to the Supreme Court of Oklahoma.*

BRIEF OF DEFENDANT IN ERROR.

FRANK DALE,
A. G. C. BIERER,
C. W. RANSOM,
Attorneys for Defendant in Error.

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On Motion to Dismiss Plaintiff's Cause in Trial Court and Motion to Dismiss Appeal, and on the Merits of the Case.

STATEMENT OF FACTS.

MAY IT PLEASE THE COURT:

We desire it clearly understood, that at the time this action was brought, both the legal and equitable title to the land in controversy

was still vested in the United States. William A. Penny had the homestead entry thereon in the Land Department, which entry had not passed either to final proof or patent. Ida McClung necessarily had no form of title thereto, and no right of possession therein.

Theretofore, and in the contest case of William A. Penny vs. Charles R. McClung, the Interior De partment had determined that the rights of William A. Penny, were prior and superior to the claim of said Charles R. McClung; and Ida McClung his widow had no status except that of a defeated homestead claimant.

That when this action was brought, Ida McClung was in possession of the entire tract, and William A. Penny, had merely standing room for his house, in the middle of the public highway. That Ida McClung and her husband had theretofore fenced the entire tract, and forcibly excluded William A. Penny from the use and enjoyment of any part thereof.

That this is an action brought by a successful homestead claimant, who is out of possession, against his defeated adversary for the possession of the tract, to the end that he may cultivate and improve the same as required by the homestead laws, and thus obtain title to the land. It is a suit brought while the matter is still *in fieri* in the deparmtment of the Interior to give effect in the local courts, to the Department's

decision, by placing the successful claimant in position to comply with the requirements of the homestead laws.

We, also deny, the statement by plaintiff in error that the record shows that William A. Penny, was within the outer boundary of the "country known as the Cherokee Outlet," at twelve o'clock, noon, September 16th, 1893; that the fact is that he was at that time on the eastern boundary of said Outlet. We beg to differ with counsel as to the construction to be placed upon the phrase "Country known as the Cherokee Outlet."

We assert that the Department of the Interior has uniformly construed the President's Proclamation as placing the one hundred foot strip immediately on the eastern boundary of the land opened to settlement, and has never held any settler disqualified for running from that portion of that Strip. That the phrase, "the country known as the Cherokee Outlet," has been uniformly and properly construed by the department as synonomous with the phrase, "the entire tract of country to be opened to settlement under this Proclamation."

BRIEF.

The Judgment of the Supreme Court of the Territory of Oklahoma upon the effect of their own code of procedure in reference to the action of Forcible Entry and Detainer, is of controlling force in this Court. Where that Court in construing this statute holds that remedy to be a mere action for possession based upon the immediate rights of the parties, and refuses to allow the defendant by his pleadings before the Justice of the Peace, to transform the action into a suit in equity, on his part, and thus oust the Justice of jurisdiction in the case, such holding is binding upon this Court, and proceedings in error thereon based should be dismissed upon motion.

In such proceedings in error, where the plaintiff relies upon the point that the Justice of the Peace erroneously refused to certify the cause to the District Court, under Section 4645 of the Oklahoma Code and by reason of such error all subsequent proceedings in the cause were void for want of jurisdiction, and it appears that the Oklahoma Supreme Court has uniformly held that said Section is not applicable in actions of Forcible Entry and Detainer, such construction is binding on this Court, and should not be reversed here.

Where, in such proceedings in error, the pleadings show that the title to the land in question is still in the United States and the matter still in fieri in the Land Department, and that the action is based upon the mere right of a homestead entryman to the possession of the land under the Homestead Laws, and the defence interposed is that the Land Department has mis-applied the law in a prior contest between the parties, and the defendant admits that he has no status other than that of a defeated claimant before the Land Department, the holding of the Oklahoma Courts to the effect that such defence does not amount to a question of title, within the purview of Section 4646 of the Oklahoma Code, limiting the Justice's jurisdiction, should be sustained.

Under the rule that the Department of the Interior has sole jurisdiction of the public domain so long as title remains in the United States, and the Courts will not interfere with its orders and decisions until title passes from the government, this Court should not pass upon the correctness of the Department's decision in a particular case, where the matter is still in fieri in the Department.

The action of Courts below in refusing to pass upon the legality of the Department's action while title was still in the government should be sustained.

That provision of the President's Proclamation of August 19, 1893, which set apart the hundred foot strip for the use of settlers at the opening of the Cherokee Outlet, should be construed so as to give full effect to the objects for which it was created and to reconcile the two clauses describing its location. A construction which ignores and entirely abandons the words "Around and immediately within the outer boundaries of the entire tract of country to be opened to settlement," and defeats the object of the creation, by placing this strip remote from the eastern boundary of those lands upon a distant portion of the Osage Indian Reservation, should not be adopted.

That construction by the Land Department which reconciles those two clauses by giving the phrase, "Country known as the Cherokee Outlet" the same meaning as the words, "The entire tract to be opened to settlement," being a sensible construction in accordance with the common understanding of that phrase, and one which gives complete effect to the purposes for which that strip was created, should be sustained.

Such a construction by the Department charged with the primary enforcement of that law, having now stood for nearly ten years, should not be reversed unless shown to be manifestly incorrect.

ARGUMENT

On Motion to Dismiss in the Trial Court, and Motion to Dismiss Plaintiff-In-Error's Appeal.

Under the one heading of "Brief and Argument on Motion to Dismiss," Counsel for plaintiff in error has presented the questions of the jurisdiction of the Justice of the Peace and those presented by the motion to dismiss the appeal in this Court, without answering or discussing the authorities we have presented in support of that motion. So, we will now treat these questions together, although making but little reference to the latter motion.

We claim that the appeal in this Court should be dismissed because the title to the land in controversy is not involved; that the only question involved is the possession; and, that the possession not being shown to be worth the sum of Five Thousand Dollars, this Court has no jurisdiction to review the cause.

The action was possessory in its nature. In addition to the authorities cited by us in our brief heretofore filed on the motion to dismiss, we call the Court's attention to the following, from the Supreme Court of Kansas:—

"It has been expressly decided that the action of forcible entry and detainer is possessional merely,

and does not involve title to real estate, except to the extent that evidence of title may be incidentally shown to support the claim of right of possession."

Armour Packing Co. vs. Howe, 64 Pac. 42.

"The thing in dispute in forcible entry and detainer is not the title to real estate, but the mere right to its possession. In such class of actions the title to the real estate is not involved, but it is involved as an incident only, and not as the main subject of controversy:

McClain vs. Jones, 60 Kan. 639 (57 Pac. 500).

"An action for forcible detainer is a possessory action merely, and does not involve the title to real estate."

Wideman vs. Taylor, 65 Pac. 664.

If these declarations are the law, and we believe they are, all that is involved in this case is the possession of the land, and that not being worth five thousand dollars, this appeal should be dismissed.

These authorities just cited are in point against the motion of plaintiff in the District Court to dismiss the cause because the District Court had no jurisdiction thereof.

In the case of the Armour Packing Company vs. Howe (supra), the Supreme Court of Kansas held that the section of the code of that state (which is the same adopted into the Oklahoma code), providing that an action may be certified from the Justice of the Peace to the District Court, when it appears that title or boundary of land is in dispute, does not have ap-

plication to actions of forcible entry and detainer, (Section 4645 Okla. Code). In this case the Court also cites with approval the case of McDonald vs. Stiles, 7 Oklahoma 327, the syllabus of which reads as follows:

"The statute authorizing a Justice of the Peace to certify a case to the District Court for trial whenever the title or boundaries of real estate are put in issue, has no application to forcible entry or unlawful detainer proceedings, for the reason that title or boundaries cannot be put in issue in such proceedings.

The cases go so far as to hold that where a Justice of the Peace assumes to certify a forcible entry and detainer cause to the District Court, that the latter Court has no jurisdiction of the cause, and its judgment therein is consequently void.

If title to real estate is not an issue, and cannot be put in issue in a forcible entry and detainer proceedings, then manifestly, there was no error in the ruling of the District Court in denying counsel's motion to dismiss the proceeding on the ground that the Court had no jurisdiction of the cause.

The case of Yingling vs. Redwine by the Supreme Court of Oklahoma, cited by the opposing counsel, is not in conflict with the other decisions of that Court. The relations between the parties in that case were purely contractual, and the nature and validity of that contract was necessarily before the Court. There was no attempt to set up an outstanding title: there was

no cross-petition, as in all of the other cases we have cited. Moreover, all of the cases recognize that evidence of title is competent, for the purpose of showing the right of possession, or of showing the purpose with which an entry was made upon the land.

In the case of Conway vs. Gore, cited by counsel, from the Supreme Court of Kansas, it is distinctly stated as a general rule that "Title is not a matter of inquiry or defence in actions of forcible entry and detainer."

A title by which a party claims his right of possession is one thing; the contest over the validity of that title is entirely a different thing; the claim of the plaintiff in error in this case is based upon the assumption that they are one and the same thing. Because numerous cases have held that title may be offered in evidence as proof of plaintiff's right of possession in this class of cases, it is asserted that the inchoate right of a defeated homestead claimant, may be litigated in a forcible entry and detainer case arising in the justice court; that the mere allegation by defendant that the Land Department erred in applying the law in the contest case, where the title is still in the government, serves to oust the Justice of the Peace from jurisdiction to hear and determine plaintiff's cause.

All of the Kansas decisions construing this statute, and all of the Oklahoma decisions are

opposed to this theory. None of the Kansas cases cited by counsel are in point in this case. This is particularly true of those cases, in which he claims that a defeated homestead claimant, has defeated the action brought by his successful adversary, by an assertion of title growing out of facts which under the Land Department's holdings gave him no right to the land.

None of the Kansas cases cited were homestead cases, or grew out of facts similar to this case.

The case of Price vs. Olds (9 Kan. 66) and Alderman vs. Boeken (25 Kan. 658) while they grew out of forcible entry and detainer proceedings, arose upon contracts to purchase the land. The case of Duffy vs. Rafferty (15 Kan. 9) and Simpson vs. Boring (16 Kan. 248) were not even forcible entry or detainer proceedings; they were ejectment cases. The case of Mooney vs. Olsen (21 Kan. 697) was an action for rent.

We have been unable to find the case cited as Holland vs. Ess, and as being in 31 Kan. at page 88.

The case of Conway vs. Gore, we have already referred to.

Counsel has also cited the case of Langford vs. Monteith, (102 U. S. 145) which holds that, where in a civil suit before a Justice of the Peace of the Territory of Idaho, it appears by answer verified by affidavit, that the question of title is necessarily involved, the justice should certify the case to the District Court

for trial, and if he thereafter proceeds to try the cause, it must on appeal from his judgment, be dismissed. An examination of this case will show that the Court was giving effect to the construction placed upon the Idaho statute by the Idaho Supreme Court.

The Court said:—

"The judgment of the Supreme Court of Idaho, on the effect of their own code of proceedure in this respect, will not be reversed here."

But the construction placed upon that statute by the Idaho Court is not the construction which has been placed upon our statute by the Courts which have had to construe it.

Our statute is the Kansas statute adopted in this Territory in 1893.

The Supreme Court of Kansas in Duncan vs. Yordy, 27 Kansas 349, held that the mere filing of an answer stating that the boundaries of land are in dispute although verified as required by Section 7 of the civil procedure before justice, will not necessarily oust the justice of jurisdiction.

Under this decision upon the Kansas Code, the justice could proceed to try the case, notwithstanding the filing of such affidavit, and, unless it appeared at the trial that the boundaries or title to land were in dispute, judgment could be rendered upon the cause.

This construction, having been placed upon this

statute before its adoption into Oklahoma, was adopted as a part of the statute.

Willis vs. Eastern Trust and Banking Company, 169 U. S. 295—307.

And that being the law here, of course, it is immaterial what the law on the same question is in Idaho.

But that the Justice Court did have jurisdiction of this cause and, therefore, the cause should not have been dismissed on plaintiff in error's motion, for want of jurisdiction in the District Court, we consider as settled by the decision of this Court in Black vs. Jackson, 177 U. S. 349, which squarely holds that Jackson as entryman was entitled to bring his action of forcible entry and detainer.

We do not understand, however, that this case of Black vs. Jackson holds that Jackson was disqualified, or even may have been disqualified because he ran from the Chilocco Reservation.

The Court said:—

"No opinion was expressed on this question by the Supreme Court of the Territory, and we need not now express an opinion."

The Langford vs. Monteith case is also cited upon the proposition that this Court has jurisdiction of this cause by reason of the fact that the land is worth more than Five Thousand Dollars. That case does not show what amount was involved and does not show what

the value of the possession was. The case appears to have involved the occupancy of buildings and grounds under a lease and the question here presented seems not to have been raised or considered.

The case of the New Orleans Pacific Railway Co. vs. Parker, 143 U. S. 42, we consider has no bearing on this case. That was an appeal in equity to foreclose a mortgage on railroad land, and it appears that more than the jurisdictional amount was involved.

Counsel attempts to illustrate the alleged error of the Court by supposing the action of forcible entry and detainer was brought against one holding under an oral contract of sale and delivery of possession, by the holder of a subsequent deed from the same grantor, and citing authorities upon this supposed case.

We do not consider that this supposition illustrates anything pertinent to the cause at bar for the reason that Ida McClung did not possess this color of title, and, therefore, did not have the "color of title in equity" which the Court in the case of Alderman vs. Boeken, 25 Kansas 658, held was sufficient to defeat the action.

All the claim which Ida McClung has to this land, and with which she is attempting to defeat this action of forcible entry and detainer by the homestead entryman, is a claim of incohate right, the validity of which has been denied by the Interior Department, and that claim does not constitute title or color of

title or anything else that constitutes a defence to this action.

That the party who has been permitted by the Interior Department to place his homestead entry upon the land is the one who is entitled to the possession against the defeated entryman, and every other person claiming adversely to him under the homstead law, so long as the title remains in the government, would appear manifest. If this is not true then the Land Department may decide that one man is entitled to a homestead entry, while the Courts may step in and decide that another man is entitled to this entry, and thus give rights of possession in conflict with the decisions of the Interior Department, while the subject remains within its control.

That the successful contestant for the right to make homestead entry is entitled to the possession of the land, has been repeatedly affirmed by the Supreme Court of Oklahoma.

In the case of Brown vs. Hartshorn, 69 Pac. 1049, that Court said:—

"This Court has repeatedly held that where two parties have been claimants to a tract of public land and the adverse claims have been finally disposed of in the Land Department, and the successful claimant has been permitted to make homestead entry, such entryman then becomes entitled to the undisturbed possession of the tract as against the unsuccessful claimant, and such unsuccessful claimant, by refusing to vacate the land, and continuing to occupy the

same, becomes a trespasser, and his possession is wrongful; and the Courts will give effect to the decisions of the Land Department so long as the title is in the United States.

Woodruff vs. Wallace, 3 Okla. 355, 41 Pac. 357; Reaves vs. Oliver, 3 Okla. 62, 41 Pac. 353; Barnes vs. Newton, 5 Okla. 428, 48 Pac. 190, 49 Pac. 1074; Cox vs. Garrett, 7 Okla. 375, 54 Pac. 546; Calhoun vs. McCornack, 7 Okla. 347, 54 Pac. 493; Glover vs. Swartz, 8 Okla. 642, 58 Pac. 943; McDonald vs. Brady, 9 Okla. 660, 60 Pac. 509; Barnett vs. Ruyle, 9 Okla. 635, 60 Pac. 243.

We see no reason why one who has been determined by the proper tribunal rightfully entitled to the possession of a tract of public land should be forcibly kept out of possession by one who proposes at some future time to wage a suit against him to determine the correctness of such determination. Forcible de-detainer was the proper remedy in this action to determine the right to immediate possession. Nothing else was involved, and no other questions could be determined."

The Court in rendering this opinion understood that it was following the interpretation of our statute of forcible entry and detainer as placed upon it by the Supreme Court of Kansas, for it cited in this case the decision in McNamara vs. Culver, 26 Kan. 661; Conaway vs. Gore, 27 Kan. 122; McClain vs. Jones, 60 Kan. 639, and Armour Packing Co. vs. Howe, 62 Kan. 587, 64 Pac. 42.

This case follows the case of McQuiston vs. Walton, decided by the Supreme Court of Oklahoma at the same time, and there has been numerous decisions to

the same effect of more recent date.

The latest reported case is that of Anderson vs. Ferguson, 71 Pac. 225, which holds:—

"An action of unlawful and forcible detainer is purely a proceeding at law and does not, and cannot, involve the exercise of equitable jurisdiction, the right to the possession being the sole question involved. Questions other than the immediate rights of the parties cannot be litigated in such actions." (Syllabus prepared by the Court.)

It is quite useless for counsel to assert that his client raised a question of title by her pleadings in the trial Court. The facts which he there pleaded do not amount to even *color of title*.

Many authorities might be cited upon this proposition, but we shall be content to show that such is the rule prevailing in the Oklahoma Courts, which rule has the express sanction of this Court.

In the case of Black vs. Jackson, 177 U. S. 349, we find the following direct statement of this matter:—

"And we cannot find that the Court has in any case withdrawn or qualified the ruling that an entryman out of possession, and having a decision by the Land Office in his favor, may proceed against his adversary in possession by an action of forcible detainer, and thus obtain possession without resorting to the extraordinary remedies used by a Court of Equity. According to the decisions of that Court, Black as between himself and his successful adversary *was in possession, without color of title*. Now by the statutes of the Territory in the article relating to forci-

ble entry and detainer, if it be found that lands and tenements after a lawful entry 'are held unlawfully' then the Justice 'shall cause the party complaining to have restitution thereof,' and it is provided that proceedings under that article may be had 'in all cases where the defendant is a settler or occupier of lands and tenements without color of title, and to which the complainant has the right of possession.'" (The italics are ours.)

The Court not only finds that the facts pleaded by Black do not amount to color of title under the holding of the Supreme Court of Oklahoma, but gives its express sanction to that holding by asserting that Jackson had an adequate remedy at law under that provision of the forcible entry and detainer statute relating to "settlers or occupiers of lands and tenements without color of title."

Under the rule of the Territorial Court, thus expressly sanctioned by this Court, the facts pleaded by Mrs. McClung do not amount to even color of title.

In the face of that settled rule of law, it is manifestly impossible for her counsel to maintain that the pleadings in the trial Court raised a question of title, so as to defeat the jurisdiction of the Justice of the Peace. Pleadings which do not set forth facts showing color of title in the defendant in this class of cases, cannot be held to raise a question of title, within the purview of the statute which prohibits Justices of the Peace from trying cases involving title or boundaries of real estate.

Counsel's sweeping assumption that the facts pleaded in the trial Court do raise a question of title, such as to either oust the justice of jurisdiction, or require him to certify the cause to the District Court is, therefore, wholly without foundation. Those pleadings set forth precisely the same facts as Black set forth in the case last cited. This Court has held that such a state of facts as Black presented does not amount to color of title.

Moreover, it is clear from the record that no question of title could be raised in these pleadings. The admitted status of this tract will suffice to show that no question of title could be raised.

This tract is a part of the public domain. The government had in no wise parted with either the legal or equitable title thereto, when this action was commenced. Neither McClung nor Penny had ever attempted to make final proof. Neither of them had ever had any title therein. Penny as the successful contestant had only gone so far as to perfect his homestead entry. The entire matter was still *in fieri* in the Land Department. Penny was required to reside upon the land, cultivate and improve it, before he would be in position to submit final proof. His rights were conditional and inchoate, and might never ripen into any form of title. Jurisdiction of the tract, and case, was still vested exclusively in the

Department. Mrs. McClung was, as we have shown, "a settler or occupier without color of title." The only tribunal having jurisdiction had passed upon her claim to the land, and cancelled it.

She was in possession of all the land when the case was commenced. Penny was forced to resort to the local courts to enforce his right of possession, and place himself in position to cultivate and improve the tract as required by law. He merely asked the local courts to give effect to the judgment of the Land Department, to the extent of placing him as the successful claimant in possession of his land, so that he might comply with the law and earn his title thereto.

That the local courts should under such circumstances afford a summary and speedy remedy to the rightful claimant, as against one who is a mere trespasser and seeks to exclude him from possession of any part of his homestead, is conceded by all courts. In the case of Black vs. Jackson, this Court held that while mandatory injunction was not a proper remedy, forcible entry and detainer was applicable to this class of cases, and would afford a speedy and adequate remedy.

This is an important question of practice that affects many cases in this Territory. Immediately upon the rendition of the decision in Black vs. Jackson, scores of parties commenced their actions under this

statute. They have relied upon the holding that forcible entry and detainer was the proper remedy in this class of cases. In line with this Court's holding in that case, the District Courts, and the Supreme Court of Oklahoma, have in scores, if not hundreds of cases held that this action would lie.

Should it now be held that the action can be defeated by appearing before the justice and setting up some alleged error of law in the Department's decision —should it be held that such a plea raises a question of title that will oust the justice from jurisdiction, then this remedy fails as well as that of mandatory injunction. If such a plea does raise a question of title, then the justice cannot under our organic act, try the case, for he has no jurisdiction. On the other hand, he cannot certify the case to the District Court, for both the Kansas Courts, and our own Territorial Courts, have expressly held that the clause providing for certification, does not apply in forcible entry and detainer cases. The District Court cannot acquire jurisdiction in that manner. (See McDonald vs. Stiles, supra). The Justice Court alone has original jurisdiction. The action of forcible entry and detainer cannot, under the Oklahoma Statute be brought in any other court.

At the time the litigation in this case was waged in the Justice Court, and in the District Court, and when Plaintiff in Error here was attempting to present

her so-called title, that is the assertion of her incohate right of homestead entry, which had been denied by the Land Department, the title to this land was in the government, and Penny had the mere right and status of an entryman under the homestead laws. In this situation under the decisions of this Court the decision of the Interior Department could not be challenged. It has been repeatedly held by this Court that so long as the title remains in the United States the courts have no jurisdiction, and will not interfere with departmental decisions, concerning the disposition of the public domain.

In the case of Johnson vs. Towsley, 13 Wallace 72, which is the leading case on the subject, this Court speaking by Mr. Justice Miller, said:

"This Court has at all times been careful to guard itself against an invasion of the function confided by law to other departments of the government, and in reference to the proceedings before the officers intrusted with the charge of selling the public lands it has frequently and firmly refused to interfere with them in the discharge of their duties, either by mandamus or injunction, so long as the title remained in the United States and the matter was rightfully before those officers for decision. On the other hand, it has constantly asserted the right of the proper courts to inquire, after the title had passed from the government, and the question became one of private right, whether, according to the established rules of equity and the acts of Congress concerning the public lands, the party holding that title should hold absolutely as his own, or as trustee for another. And we are satis-

fied that the relations thus established between the courts and the Land Department are not only founded on a just view of the duties and powers of each, but are essential to the ends of justice and to a sound administration of the law."

In the case of Moore vs. Robbins, 96 U. S. 530, the Court said:—

"But in all this there is no place for the further control of the Executive Department over the title. The functions of that department necessarily cease when the title has passed from the government. And the title does so pass in every instance where, under the decisions of the officers having authority in the matter, a conveyance, generally called a patent, has been signed by the President, and sealed and delivered to and accepted by the grantee."

This doctrine of non-interference of the courts with the decisions of the Interior Department until the title had so far passed that the land had become the subject of private ownership, is expressly declared in the case of Wilburn vs. Baldwin, 5 Oklahoma 265.

Under these decisions the correctness of the determinations upon this contest made by the Land Department could not be questioned until Penny made final proof and received his final or patent receipt for this land, and this being true the question could not be litigated in this cause, even if it were true that title may be tried in an action brought as a forcible entry and detainer proceeding.

Under the Kansas and Oklahoma decisions title

may be incidentally involved in such a cause. In the case of Brown vs. Hartshorn (supra), the Court said:

"It has been repeatedly held that the action of forcible detainer as provided by our statute, is purely a possessory action, and that questions of title or right to title cannot be determined in such actions. If title is involved, it is only as an incident, and may be inquired into, for the purpose of determining who has the right to possession."

This being true, if the theory of the counsel for plaintiff in error is correct that they have in this form of action a right to challenge the correctness of the decision of the Land Department concerning the rights of these parties to this land, it does not follow that the cause should have been dismissed in the District Court upon the motion urged by counsel here, but the Court should then have considered the question whether this claim of Mrs. McClung was sufficient to entitle her, instead of Penny, to the possession of this land. If the Court should take this view of the case then it would become important to consider the cause upon the merits of the claim of plaintiff in error that the Land Department erred in awarding this land to Penny, and this brings us to the merits of that question.

ARGUMENT ON MERITS.

The question attempted to be presented by the answer in the Justice Court filed by Ida McClung is:—Did the Land Department err in its decision holding that William A. Penny was the first settler upon this tract of land and a qualified homestead entryman? That he was the first settler is not controverted by plaintiff in error, but it is asserted that he was prohibited from making the run into the lands opened by the Proclamation of the President of the United States of date August 19th, 1893, from the Osage Reservation. It is claimed that the one hundred foot strip of land around the Cherokee Outlet that was opened to settlement September 16th, 1893, was on the 96th Meridian, the east line of the Osage Indian Reservation. No Court or Land Department has ever sustained this claim of counsel.

The decision of the Secretary of the Interior in the case of Cagle vs. Mendenhall, 20 L. D. 466, cited by counsel, was expressly overruled in the case of Brady vs. Williams, 23 L. D. 553, and subsequently that decision was recalled and the land awarded to Cagle. In that one case, however, which is the only solace or consolation of the anti-reservation runners, the secretary denies the only proposition which could ever give any foundation to the conclusion reached in that case and held that the one hundred foot strip

was on the eastern border of the Cherokee Outlet as we claim it to be, that is, of the land that was opened to settlement, and based the decision on the instructions of the Department, "to remove all persons from the one hundred foot strip on the eastern boundary," and upon the instructions to the special agent in answer to the inquiry, "whether persons would have the right to make the run from the eastern border of the tract," and the secretary concluded:—

"I am satisfied that the action of the department in forbidding persons from making the run from any of the reservations on the eastern border of the 'outlet' was not inconsistent with the Act of Congress."

So even that decision of the Secretary, long since overruled, and which is the only support for the claim of plaintiff in error, disputed the principle upon which the claim of plaintiff in error is based, by holding that the one hundred foot strip was on the eastern boundary of the country that was being opened to settlement.

The decision that settlers entering from the Osage and other reservations adjacent to the lands that were being opened to settlement were disqualified because they had crossed or gone upon Indian lands, was so untenable that this argument is no longer made, but resort is had to this one decision of erroneous conclusion upon which to base the claim of disqualification.

If a settler or runner could not have entered from the Osage Reservation, he could not for the same reason have entered from a one hundred foot strip on the east line of that reservation, and could not, for the same reason, have entered from the Cherokee Reservation, therefore, he could not have entered from the east side at all, because the east side of the Cherokee Outlet was entirely bordered by Indian reservations.

The President's Proclamation, however, said:—

"A strip of land one hundred feet in width, around and immediately within the outer boundaries of the entire tract of country to be opened to settlement under this proclamation, is hereby temporarily set apart for the following purposes and uses, viz:

Said strip, the inner boundary of which shall be one hundred feet from the exterior boundary of the country known as the Cherokee Outlet, shall be open to occupancy in advance of the day and hour named for the opening of said country, by persons expecting and intending to make settlement pursuant to this proclamation."

The language is clear and unambiguous. It temporarily reserved a strip of land one hundred feet wide for the occupation of the intending settler, and within which he might not go, but anywhere upon which, or outside of which, he might make the run on the opening day.

That language is not ambiguous and, therefore, is not subject to construction. For language which is

clear needs no construction and, if it need none, it can not be construed.

Yerk vs. United States, 173 U. S. 439.

To place the one hundred foot strip on the 96th meridian would nullify the words "around and immediately within the outer boundaries of the entire tract of country to be opened to settlement," for the reason that the Osage reservation was not within the outer boundary of any tract of country that was opened to settlement, and if the Osage and other reservations were not included within the tract, then, the entire tract was not being opened to settlement. Such a construction would absolutely nullify this clause of the President's Proclamation. And it is one of the canons of construction that Acts of the Legislature shall be so construed that one section will not defeat or destroy another but explain and support it.

Bernier vs. Bernier, 147 United States, 242.

The purpose of the President in providing the one hundred foot strip for the occupancy of intending settlers was to aid and facilitate the opening of this new country and the purpose of those intending to make entry thereon by providing a place immediately adjacent to the land to be settled and entirely around the entire tract to be settled, upon which no person could disturb or molest the settler or claim he had no right to be. The construction now sought to be placed upon this proclamation by counsel for plaintiff

in error would absolutely defeat this purpose because it would place this one hundred foot strip on the east side of the tract, many miles away, instead of "immediately within the outer boundaries" thereof. And it it another canon of construction that statutes must receive such an interpretation as will effectuate the legislative intention, and, if possible, avoid an unjust and absurd conclusion.

Law Ow Bew vs. United States, 144 U. S. 47.

The President's Proclamation prohibited entry before the hour of the opening only upon the land to be opened to settlement. It stated: "Said land so to be opened as herein proclaimed shall be entered upon and occupied only in the manner," etc., and these lands that were being opened to settlement were the lands which the Act opening said lands had declared to be a part of the public domain. This Act of March 3rd, 1893, (Statutes U. S. at Large, Vol., 27, p. 642), provided:—

"Said lands, except the portion to be allotted as provided in said agreement, shall, upon the payment of two hundred and ninety-five thousand seven hundred and thirty-six dollars, herein appropriated, to be immediately paid, become and be taken to be and treated as a part of the public domain."

So that the "said lands," referred to in this Act of Congress and President's Proclamation, opening these lands to settlement and which were to be entered from the one hundred foot strip were the

lands that were declared to be "a part of the public domain."

Now, if the Osage Reservation was "a part of the public domain" on September 16th, 1893, then it was a part of the lands which the President designated as "the country known as the Cherokee Outlet" and was opened to settlement. No one will claim that these conditions existed. The Osage Reservation was not opened to settlement and it was not, and is not, a part of the public domain. Therefore, it did not come within the designation of "said lands" in the Act of March 3, 1893, or "Said lands to be opened as herein proclaimed" in the President's Proclamation. Therefore, the Osage Reservation was not a part of "the entire tract of country to be opened to settlement" around which the one hundred foot strip was located.

The Osage Reservation was not a part of the "Country known as the Cherokee Outlet" by the President and people of the United States on August 16th, 1893, when this Proclamation was promulgated. This designation of land by the President was in common terms, such as were meant to be and could be understood by all the people without reference to any legal definition or technical boundaries. "The country known as the Cherokee Outlet" embraced a tract of country that was known, not technically, but generally, by the great body of population that constituted American citizenship at that time. It was the coun-

try that the homeseekers, as the President well knew, had been looking to for years. It was a country not occupied, owned or possessed by Indians or Indian tribes, but that country that was commonly called, and commonly "known as the Cherokee Outlet" and to which the Indian title had then been extinguished and which was open to homestead settlement.

The Osage Reservation was no more a part of the Cherokee Outlet at that time than old Oklahoma was a part of the Muskogee or Creek Country after the Act opening it to settlement.

By the treaties by which "old Oklahoma" was acquired from the Creek Indians and opened to settlement under the Act of March 2nd, 1899, that country forever ceased to be a part of the Creek or Muskogee lands, and by the treaties under which the Osage Indians acquired their reservation on the Cherokee Outlet, the lands of the Osages forever ceased to be a part of the Cherokee Outlet, and it was evidently the intention of the President when he was describing in his Proclamation a tract of country thereby to be thrown open to settlement on September 16th, 1893, to designate a tract of country that was then at that time, at that very hour, "known as the Cherokee Outlet."

The lands of the Osages taken out of the old Cherokee Outlet were no more a part of the country

at that time "known as the Cherokee Outlet" than the reservation of the Osages on the north of that outlet and in the State of Kansas, and which they had long since ceded to the United States Government, was a part of that outlet.

The terms "Known as the Cherokee Outlet," used by the President in describing the country around which the one hundred foot strip was placed are the same terms as those used in the Organic Act of Oklahoma in describing that portion of the Cherokee lands which was left after the boundaries of Oklahoma Territory had been drawn around the reservations in the eastern portion of the old Cherokee Outlet. Congress, in Section 1, of the Organic Act, after describing and defining the boundaries of Oklahoma Territory, said:—

"Whenever the interest of the Cherokee Indians in the land known as the Cherokee Outlet shall have been extinguished and the President shall make Proclamation thereof, said Outlet shall thereupon and without further legislation become a part of the Territory of Oklahoma."

In the case of the United States vs. Pridgeon, 153 U. S. 48, the Supreme Court of the United States, in considering the question whether this land known as the Cherokee Outlet was or was not a part of the Territory of Oklahoma, said:—

"The boundaries of Oklahoma Territory as defined by the Act of May 2nd, 1890, creating a tempo-

rary government therefor, did not include the Cherokee Outlet."

That declaration was made concerning that country which the President described in the Proclamation as the "Country known as the Cherokee Outlet." Thus, ever since the passage of the Organic Act placing the Indian reservations on the eastern border of the ancient Cherokee Outlet, within the Territory of Oklahoma, the legislative, executive and judicial branches of the government have all understood and referred to the country "Known as the Cherokee Outlet" as being the country west of the Indian reservations on the Old Cherokee Outlet, and which were not opened to settlement by the President's Proclamation, of August 19th, 1893.

No other construction can be placed upon these Acts of Congress, the President's Proclamation and the decision in the Pridgeon case. And these constructions, by parity of reasoning, must place this one hundred foot strip on the eastern border of the lands known as the Cherokee Outlet, west of the Osage, Ponca and other Indian reservations. Thus the one hundred foot strip has uniformly been placed by the branch of the government which was vested by Congress with the authority to administer this Act of Congress opening these lands to settlement. And this construction should not only be received with great weight by this Court, but having been adhered to in

the disposition of these lands for a period of almost ten years, should now be considered as decisive of this suit.

United States vs. The State Bank of North Carolina, 6 Peters 29.

United States vs. Moore, 95 U. S., p. 760.

United States vs. Johnson, 124 U. S., p. 236.

Pennoyer vs. McConnaughy, 140 U. S., p. 1.

United States vs. Alabama, etc., Ry. Co., 142 U. S., p. 615.

Counsel claims that all the lands west of the 96th meridian were the lands referred to in the President's Proclamation, as the "Country known as the Cherokee Outlet" and were all opened to settlement except the land reserved therein.

When the reservations of the Ponca and Osage Indians were made they lost their identity as a part of the Cherokee Outlet, and became reservations of those tribes and have ever since been so known and designated. And ever since the passage of the Organic Act of Oklahoma they have been separate and distinct bodies of land from that "land known as the Cherokee Outlet" referred to in Section 1, of the Organic Act.

Would the Ponca, Otoe, the Missouri, Osage and Kansas Indian lands have been opened to settlement by the Proclamation of President Cleveland declaring that the "country known as the Cherokee Outlet" was

opened to settlement if he failed to expressly exclude these Indian reservations from the operation of the Proclamation opening these lands to settlement? Certainly not. There was no law providing for opening those lands to settlement. They were, and are, no more open to settlement than the lands of the Cherokee Indians on the east of the Osage Reservation, and there could have been no more reason for requiring the intending settler to run from the east side of the Osage Reservation than there would have been to have required him to have run from the east side of the Cherokee Nation.

It is significant that the President did not use the terms referred to in that part of the Proclamation reserving from settlement the Indian Reservations of the Osage and other Indians, the Cherokee title to which, if any there was, was extinguished in the purchase by treaty from the Cherokee, Tonkawa and Pawnee Indians, approved by Act of March 2nd, 1893, but that he did use these terms only in referring to the "said lands to be opened" to settlement.

None of these terms, on which counsel now lays so much stress, are used in that part of the Proclamation describing the reservations therein cited, and the reading of the entire list of reservations would not have disclosed that they ever were in the Cherokee Outlet by name, and it remained for the President to use

these terms, with reference to the country with which he was dealing, after the reservations in the Proclamation had been made. He had, in the course of his Proclamation, recited the previous Acts of Congress ratifying the Indian treaties, and the Acts otherwise referred to in the Act of March 3rd, 1893, and had defined the boundaries of the countries, and had specifically recited the lands under the several agreements therein referred to which were not to be opened to settlement; and he then began his declarations of the terms and conditions upon which the "said lands to be open" to settlement might be entered upon and occupied, and it was with reference to the "lands to be opened" to settlement that the President, for the first and last time in the Proclamation, used the expresssion, "Country known as the Cherokee Outlet." He evidently used this as a general term to designate the lands opened to settlement, and not as a description of the country he had just dealt with which was not open to settlement.

Official maps prepared by the government showed this portion of the Cherokee lands lying west of these reservations as the "Cherokee Outlet." When the Proclamation was prepared there accompanied it a map showing the lands opened to settlement. Upon this map showing the lands to be opened to settlement, and published for general distribution before the opening, the term "Cherokee Outlet" is used as

applied to these lands, and not to the entire tract west of the 96th meridian.

The newspapers for many months had teemed with news concerning this opening. In every corner of our land it was discussed with eager interest and expectation. Every paper, every person, spoke of it as the "Opening of the Cherokee Outlet." The lands then opened were commonly known to all as the "Cherokee Outlet."

Knowing that such was the popular designation of this opening, the President used the phrase "Country known as the Cherokee Outlet," as a general term for the lands to be opened to settlement.

Counsel claims that in all Acts and Proclamations referring to this country it was referred to as "the Country known as the Cherokee Outlet." This is a mistake. Those terms are not used in the Act of Congress opening the country to settlement, or in any Act of Congress excepting the Act of May 2d, 1890, the Organic Act of Oklahoma, which we have before seen, referred to that part of the old Cherokee Outlet west of all these Indian reservations which were not open to settlement. These exact terms, "Country known as the Cherokee Outlet," were never used in any Act of Congress. The designation in the Oklahoma Organic Act was "Land known as the Cherokee Outlet," which of course meant the same thing as the President was referring to when he said "Country known

as the Cherokee Outlet." The term used in the Act opening this country was simply "Cherokee Outlet." The President carefully avoided using that term in designating the country to be opened to settlement, and used without quotation, the term "Country known as the Cherokee Outlet," as, indeed, it was known by all intending settlers.

The prohibition contained in the Act of Congress that "No person shall be permitted to occupy or enter upon any of the lands herein referred to except in the manner prescribed by the Proclamation of the President opening the same to settlement, and any person otherwise occupying or entering upon any of said lands shall forfeit all right to acquire any of said lands," lends no assistance in determining where the one hundred foot strip was from which, or from beyond which, manifestly, any settler could run into the country to be open to settlement. That provision did not declare that no person could run from any point west of the 96th meridian, or from any of the Indian reservations, which had been located upon the old Cherokee Outlet. It only prohibited the entry in any other manner than as prescribed by the Proclamation.

None of the languageof Mr. Justice Brewer, contained in the decision of Smith vs. Townsend, 148 U. S. 490, is susceptible of the construction that the Act of March 2nd, 1889, was intended to prohibit settlers from entering any of the lands west of the 96th merid-

ian that might thereafter be opened to settlement from a point west of that line. It was not in that decision, or any other decision, ever declared that the settlers entering Old Oklahoma could not make the run from the Iowa and Sac and Fox country, both of which were east of Old Oklahoma and west of the 96th meridian. Both of those reservations were a part of the "entire territory" west of the 96th meridian, but in all of the decisions which have finally controlled the disposition of lands in Oklahoma, and which have referred to the question, it has been held sufficient that the settler was not within the outer boundaries of the particular territory that was being at that time open to settlement.

The wall, described in Smith vs. Townsend, around the territory to be opened to settlement was a wall around old Oklahoma, and not a wall around all of the country referred to in Section 14, of the Act of March 2nd, 1889.

Counsel misconstrues the language of Mr. Justice Brewer, in Smith vs. Townsend, to mean that the "wall" therein spoken of was intended by Congress to be placed around the entire territory mentioned in Section 14 of the Act of March 2nd, 1889, that is, all of the Indian land west of the 96th meridian, Such a declaration is not made, or intended to be made, in this decision. It is therein stated:—

"The evident intent of Congress was, by this leg-

islation, to put a wall around this entire territory, and to disqualify from the right to acquire, under the homestead laws, any tract within its limits, everyone who was not outside of the wall on April 22nd." And,

"But if at the hour of noon on April 22nd, when the legal barrier was by the President destroyed, he was in fact outside of the limits of the territory." And,

"For it is obvious that, when a railroad runs through unoccupied territory like Oklahoma, which on a given day is open for settlement, numbers of settlers will immediately pour into it, and large cities will shortly grow up along the line of the territory."

These various expressions show that the writer of this decision, and this Court, referred to "this entire territory" and "the limits of the territory" as being the "unoccupied territory" * * * opened for settlement," and not all of the Indian Reservations referred to in the Act of March 2nd, 1889.

This is made clear also by considering the declaration which the court makes of the intent of the Act of Congress, in the following language:—

"It would destroy absolutely that equality which was evidently the intent of Congress in the legislation."

It was that equality which was the purpose and object of the President in fixing the one hundred foot strip around the land to be opened to settlement within which no settler might enter until the hour of the opening. What equality would there be in placing that one hundred foot strip on the outer boundary of

the land to be opened to settlement on three sides thereof, and from twelve to fifty miles away from that outer boundary on the other side thereof? The Proclamation would thus become an instrument of inequality instead of one of equality, because those entering from three sides of the tract, after leaving the one hundred foot strip would immediately go upon the opened lands, while those entering from the other side thereof would have to run from twelve to fifty miles before they could gain the privilege which those entering from the other three sides would gain immediately. There certainly would be no equality in this.

But, this one hundred foot strip was upon land opened to settlement, for the Proclamation in immediate connection with the provision with relation to the one hundred foot strip said:—

"Such occupancy shall not be regarded as trespass or a violation of this Proclamation, or of any law under which it is made, nor shall any settlement rights be gained thereby."

The use of that language shows that the President understood, in framing the Proclamation, that the one hundred foot strip was "around and immediately within the outer boundaries of the entire tract of country to be opened to settlement," and that the one hundred foot strip was upon the same kind of land throughout, and that this one hundred foot strip was upon the land that was opened to settlement, and so he declared, "Nor shall any settlement rights be

gained thereby."

What settlement right could have been gained on the Osage and Kaw Reservations, were this strip located along the south, east and north sides of the Osage Reservation and the north side of the Kaw Reservation, as would be the case if the position of plaintiff in error in this case is sound? Certainly none.

As those Reservations were not opened to settlement, if the President had understood in this Proclamation that he was putting the one hundred foot strip upon the Kaw and Osage Reservations, and not upon the border of the lands opened, he would evidently have stated that such occupancy, where the same was made upon lands being opened to settlement, should not be regarded as a trespass, and that no settlement right should be acquired upon the opened lands, and that the settler should not be permitted to remain upon the Indian lands longer than until Twelve o'clock, noon, September 16th, 1893, when the settlers right to occupy the Indian land, if that was the intent of the President, should be declared ceased.

But the President was not speaking or intending to speak of a trespass upon Indian lands.

The President himself was a trespasser upon Indian lands, if this Proclamation means what counsel says it does, for the President had no right to occupy or to permit the occupancy of this one hundred foot strip upon Osage and Kaw Indian Reservation lands.

The Act opening the Cherokee Outlet to settlement gave the President no right to permit the occupancy for a period of twenty-eight days of these Osage and Kaw Reservation lands, and the one hundred foot strip was placed on the eastern border of the lands to be opened to settlement as well as upon the other borders, so that the intending settlers might go to such one hundred foot strip and occupy that ground without being trespassers either upon Indian lands or upon the lands opened to settlement.

The canon of statutory construction, that a word or expression repeatedly used in a statute will bear the same meaning throughout the statute, unless a different intention appears, renders no assistance or aid to the determination of the question as to where the one hundred foot strip was located, for the expression, "Country known as the Cherokee Outlet" is used but once in the Proclamation and is not used in the Act which called forth the Proclamation, and the terms "Cherokee Outlet" and "Country known as the Cherokee Outlet," are not the same expressions. Both of these terms are used once in the Proclamation. The latter term is not used at all in the Act, and these terms in the Proclamation, as well as one of them in the Act, were not intended to refer to the Outlet in the same way. The term "Cherokee Outlet" is used in quotation both in the Act and Proclamation and meant to refer to the Outlet as

designated in former executive orders, while the "Country known as the Cherokee Outlet" was intended to refer to the "Cherokee Outlet" as it was commonly known throughout the country as the country being opened to settlement under the Proclamation.

This construction of the meaning of the terms "Cherokee Outlet" and the "Land" or "Country known as the Cherokee Outlet" is illustrated by the difference in the expressions, without quotation, in the first section of the Organic Act of Oklahoma, in which the terms "Except the unoccupied part of the Cherokee Outlet" and "Land known as the Cherokee Outlet" are used.

In the first portion of the section Congress declared that the Territory of Oklahoma was being formed, of all the Indian Territory, except the lands of certain tribes and "except the unoccupied part of the Cherokee Outlet," and, after having then specifically defined the boundaries of the Territory of Oklahoma, Congress proceeded to declare that "Whenever the interest of the Cherokee Indians in the land known as the Cherokee Outlet shall have been extinguished, etc.," said land should become a part of the Territory of Oklahoma.

Counsel, we think, is also mistaken in the interpretation of the decision of the Secretary in the case in Brady vs. Williams, to mean that the country known as the Cherokee Outlet was bounded on the

east by the Arkansas river. There, after quoting the language of the Proclamation referring to the location of the one hundred foot strip and giving the purpose of the President in making this reservation, the secretary says:—

"To avoid these complications the President made this reservation to enable all intending to enter lands, to congregate on this strip and thereby get an even start."

The Arkansas River only partly represented the east line. The Arkansas River was east of the country being opened to settlement, where that line did not touch the Ponca, Otoe and Missouri Reservations.

The characterization by counsel in the Court below of the very many persons who entered the Outlet from the Indian Reservations, as "25 or 30 who stole into the country in the night time despite the efforts of the soldiers to keep them out," is absolutely incorrect, and entirely unsupported by any allegation of the petition or any finding of the Interior Department. It is an attempt to prejudice this Court against a class of people who have never by any branch of the government been held to have crossed the one hundred foot strip around the "country known as the Cherokee Outlet" before twelve o'clock Noon, September 16th, 1893.

There is nothing in the findings in this case to

show whether the One Hundred and Fifty Thousand people, which counsel speaks of in his brief, were located on the east side of the country to be opened, or on the north or south boundary and we know of no decision which holds that there were any particular number located on the east, north, south or west sides of this country and made the run from there.

The provision locating the one hundred foot strip was one which sought to give an equal advantage to all persons, and each and every person had an absolute right to enter this country from any side thereof which he pleased, and the fact, if it existed, that more or less people congregated at any particular place, or any particular border, is no argument whatever in favor of declaring the Proclamation to be something else than its interpretation bears. To establish an even or an unbroken border, was not the purpose of the President in locating the one hundred foot strip. That purpose was, as the Department of the Interior has repeatedly declared, to give all persons intending to enter the strip an opportunity to "get an even start." An unbroken border on the east side would not give this equality, while a broken border would, because the broken border was the contour of the country.

The geographical certainty was just as great upon the broken or uneven border as it would have been upon the unbroken. In fact, much greater. The

people knew, generally, where the border of the country to be opened to settlement was, because that was the land they were after. They would probably have had much more difficulty in finding the east line of the Osage Country, which was not a subject of inquiry, which was not a place that anybody at that time wanted to go to, than they had in finding the eastern border of the country to be opened to settlement and which many persons did want to go to, did go to, found, and entered upon, and from which they have created farms and established homes and are providing for and rearing their families, and these conditions, we believe, are based upon a fair and proper interpretation by the Secretary of the Interior of the law opening the country, and the President's Proclamation should not now be disturbed.

The case of Decker vs. The A. T. & S. F. R. R. Co., 3 Okla. 553, renders no assistance to either side of this case. It in no way defines or mentions the one hundred foot strip, and has no relation to the question as to where the intending settler could enter the country from, on its eastern border.

Counsel claims that the Osage Reservation was a part of the entire body of land opened to settlement, and was reserved from being opened to settlement in the same manner that lands for educational and military and townsite purposes were, by the President, reserved. Is this true? Suppose the President had

not reserved Sections Thirteen and Thirty-three, would they have been reserved from the settlement which was allowed upon this entire tract of land? We say, no: they would have gone to the settler with the other section. Suppose the President had not reserved the Osage Reservation, would it have gone to the settler for his occupancy as a homestead? Could the settler, then, or any day from September 16th, 1893, till now, have settled on a foot of the Osage lands as a homestead? We say, no; because the President had no authority to open said lands for settlement. This is the difference between settlement upon the land in the "Country known as the Cherokee Outlet," and upon the land of the Osages, and shows that there is no similarity whatever between the two cases.

Counsel claims that, if it had been intended that settlers should run from the reservations on the east side of the lands that were open to settlement, booths would have been placed there for registration, and, as no such booths were placed there, it is an argument in support of the conclusion that it was the intention that settlers could not run from that side. But the President said that the settlers could run from all sides. Furthermore, there was a one hundred foot strip on the east side of this promised land that was being opened to settlement, because the President said that the one hundred foot strip was "around"

"* * * the entire tract to be opened to settlement," and it could not have been around without being somewhere on the east side. If there had been a booth placed on the 96th meridian, there would be something in this argument of counsel, but as there was no booth anywhere on the east line, no inference can be drawn from this fact, as to where the reserved strip was located. Again, if it required a booth to locate the one hundred foot strip, and, if the one hundred foot strip was not along the west side of the Osage and Ponca Reservations because there was no booth, then there was no one hundred foot strip on the west line of the Outlet because there was no booth located on the western side.

The Proclamation of the President located all the booths on the north and south lines of the land to be opened to settlement. But he at the same time said that this one hundred foot strip from which and over which the settler might run at Twelve o'clock, Noon, Central Standard Time, September 16th, 1893, was located "around and immediately within the outer *boundaries* of the entire tract to be opened to settlement. This means all the boundaries, not part of them.

Manifestly, there is nothing in the booth argument.

The questions in this case are very similar to those we now submit in the case of Winebrenner vs. Forney.

Forney ran from the Ponca Indian Reservation, while this case shows, and the Secretary found, that Penny ran from a point east of the Arkansas River in the Osage Reservation. These cases are now presented by the same counsel, and the principles governing the two cases are nearly the same. We, therefore, ask that the Court, in considering this case, also, take and consider as a part of this brief, the brief filed by us for defendant in error on behalf of Edward C. Forney in the Winebrenner-Forney case, and, in order to save repeating our argument at great length here, we make our said brief a part of this brief.

We very respectfully ask that the judgment herein be affirmed.

FRANK DALE,
A. G. C. BIERER,
C. W. RANSOM,
Attorneys for Defendant in Error.